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HAND-DELIVERED

December 16, 1997

Cynthia L. Johnson, Director
Cash Management Policy and Planning Division
Financial Management Service
U.S. Department of Treasury, Room 420
401 14th Street, S.W.
Washington, D.C. 20227

Re: Department of the Treasury
Proposed Rule on 31 C.F.R. 208 Implementing 31 U.S.C. 3332

Dear Ms. Johnson:

Enclosed are our comments regarding the proposed rule on 31 C.F.R. 208 implementing 31 U.S.C. 3332 requiring federal agencies to convert all federal payments from checks to electronic funds. Please note that in addition to our low income clients, these comments are filed on behalf of:

Consumer Federation of America
Arizona Consumers Council
Consumer Action
Mercer County Community Action Agency
National Association of Consumer Agency Administrators
National Consumers League
Organization for New Equality
Niagara Frontier Consumer Association
Public Voice for Food and Health Policy
Virginia Citizens Consumer Council

Thank you for your consideration of these comments.

Sincerely,

Margot Saunders
Managing Attorney

EFT
#136

Comments to the Treasury
on Proposed Rule 31 C.F.R. 208
Implementing 31 U.S.C. 3332
Requiring Federal Agencies to Convert all Federal Payments
from Checks to Electronic Funds

These comments, written by the **National Consumer Law Center**[1] and the **Consumer Federation of America,**[2] are also provided on behalf of the following national, state and local groups representing consumers:

Arizona Consumers Council[3]
Consumer Action[4]
Mercer County Community Action Agency[5]
National Association of Consumer Agency Administrators[6]
National Consumers League[7]
Organization for New Equality[8] and

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[1]The National Consumer Law Center is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and privates attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen examples of predatory lending to low-income people in almost every state in the union. It is from this vantage point--many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities--that we supply these comments. Cost of Credit (NCLC 1995), Truth in Lending (NCLC 1996) and Unfair and Deceptive Acts and Practices (NCLC 1991), are three of twelve practice treatises which NCLC publishes and annually supplements. These books as well as our newsletter, NCLC Reports Consumer Credit & Usury Ed., describe the law currently applicable to all types of consumer loan transactions.

[2]The Consumer Federation of America is a nonprofit association of some 250 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education. CFA's address is 1424 16th Street, NW, Suite 604, Washington, DC 20036.

[3]Arizona Consumers Council is a statewide grassroots consumer advocacy organization located in Phoenix, Arizona.

[4] Consumer Action is a California based information and advocacy organization.

[5] Mercer County Community Action Agency is a local level community and consumer agency in Sharon, Pennsylvania.

[6] The National Association of Consumer Agency Administrators (NACAA) is a national association of consumer agency administrators.

[7]The National Consumers League, is America's pioneer consumer organization. NCL is a private, non-profit membership organization dedicated to representing consumers.

[8] The Organization for a New Equality (O.N.E.) is a multi-racial organization whose top priority is expanding economic opportunity to people who have historically been excluded from the economic mainstream.

Niagara Frontier Consumer Association[9]
Public Voice for Food and Health Policy[10]
Virginia Citizens Consumer Council[11]

We are all vitally interested in the way Treasury resolves the issues raised by these proposed rules. Significant harm will come to federal benefit recipients throughout the U.S. as a result of EFT 99 if the new law is implemented as proposed in Rule 208. There are five points we address in these comments:

I. Treasury's failure to regulate the voluntary accounts established by recipients to comply with EFT 99 violates the specific statutory mandate and will result in great harm to millions of unbanked recipients of federal benefits.

II. The hardship waivers established by Treasury are too limited.
   A. No waivers are provided for those with mental disabilities, literacy problems or English fluency issues.
   B. No waivers are available to those with bank accounts who become eligible for federal benefits after July 26, 1996.
   C. Financial hardship waivers are not available to recipients who have accounts.

III Issues on the design of the ETA must be addressed.
   A. Under these proposed rules, the ETA account would not be available to recipients who have established other accounts.
   B. The law as well as policy considerations dictate that full "Reg E" protections apply to the ETAs.
   C. Answers are provided to Treasury's questions regarding appropriate features of the ETA.
   D. Additional Basic ETA Requirements

IV. Protections against attachment and set-off must apply to all accounts established to comply with EFT 99.

V. Treasury's proposed waiver for itself from these regulations is overly broad.

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[9]Niagara Frontier Consumer Association is a consumer organization located in Williamsville, New York.

[10]Public Voice for Food and Health Policy is national consumer organization that promotes improved access to food and health for all consumers.20005.

[11]Virginia Citizens Consumer Council is a statewide consumer advocacy organization, headquartered in Richmond.

I. Treasury's Failure to Regulate the Voluntary Accounts Established by Recipients to Comply with EFT 99 Violates the Specific Statutory Mandate and Will Result in Great Harm to Millions of Unbanked Recipients of Federal Benefits.

Treasury envisions a four tiered system for implementing EFT 99 for individuals:

- -- some recipients will be eligible for a hardship waiver of the requirement for electronic payment and will continue to receive paper checks;
- -- banked recipients will be encouraged to switch to direct deposit;
- -- unbanked recipients will be encouraged to go out and establish their own accounts voluntarily;
- -- those recipients who fail to inform Treasury of the financial institution for receipt of the federal payment, and who do not qualify for a waiver, will be provided the default account established by Treasury. Treasury will regulate this default account for access, reasonable cost and consumer protections.

Treasury has chosen *not* to regulate the features of the accounts established voluntarily by recipients to comply with the law.

Clear Mandate. Congress' mandate to Treasury is perfectly clear. First, all federal recipients are required to designate a financial institution to receive the electronic deposit of federal payments:

> (g) Each recipient of Federal payments required to be made by electronic funds transfer shall --
>
> > (1) designate 1 or more financial institutions . . . to which such payments shall be made; . . .[12]

Treasury is then required to provide regulations to ensure **access at a reasonable cost,** with **consumer protections.** These regulations must apply to all accounts designated by recipients to receive federal payments electronically:

> Regulations under this subsection shall ensure that individuals required under subsection (g) to have an account at a financial institution . . .

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[12] 31 U.S.C § 3332(g).

(A) will have *access* to such an account at *a reasonable cost;* and

(B) are given *the same consumer protections* with respect to the account as other account holders at the same financial institution.[13]

There is no mention in the law of default accounts to be provided by Treasury. Treasury has gone beyond the legal mandate in this law by distinguishing between the default accounts it provides and the accounts voluntarily selected by the recipients. Under this law, *all* accounts are to be designated by recipients.[14] Further, Treasury's regulations must ensure that *all* of the accounts designated by recipients be accessible at reasonable cost with consumer protections.

Treasury's proposed regulations do not comply with this clear regulatory requirement. Instead, Treasury has chosen to regulate only to a very limited extent the accounts selected by recipients voluntarily. Treasury only requires that the accounts be in the name of the recipient and at a financial institution.[15] The regulations include no requirement for direct access to the federal funds at the financial institution. The regulations include no requirement that only reasonable costs be imposed for accessing the federal funds. The regulations include no requirement that any consumer protections apply.[16] These omissions in the regulations violate the clear directive of Congress.

As the undersigned representatives of federal benefit recipients have explained in writing and verbally in numerous instances to Treasury officials regarding the implementation of EFT 99,[17] serious harm will come to millions of unbanked recipients of federal benefits if they are forced to receive their federal entitlements electronically without

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[13] 31 U.S.C. § 3332(i).

[14] 31 U.S.C § 3332(g).

[15] Proposed 31 C.F.R. 208.6.

[16] *Id.*

[17] *See* Comments in Response to Treasury Request for Comments on Interim Rule, 61 Fed. Reg. 39253 (July 26, 1996), November 25, 1996; Supplemental Comments, April 30, 1997; Testimony before the Senate Committee on Banking, Housing and Urban Affairs regarding the Impact of P.L. 104-134 ("EFT 99"), May 22, 1997; Testimony before the Committee on Government Reform and Oversight Subcommittee on Government Management, Information and Technology regarding the Impact of P.L. 104-134 ("EFT 99") June 18, 1997; Testimony before the House Committee on Banking and Financial Services regarding the impact of Treasury's Proposed Regulation under the "EFT 99," September 25, 1997. In addition, there were numerous formal and informal meetings and discussions with Treasury officials, including October, 1996; March 19, 1997; April 8, 1997; May 19, 1997; July 11, 1997; July 24, 1997; and July 25, 1997.

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[17] *See* Comments in Response to Treasury Request for Comments on Interim Rule, 61 Fed. Reg. 39253 (July 26, 1996), November 25, 1996; Supplemental Comments, April 30, 1997; Testimony before the Senate Committee on Banking, Housing and Urban Affairs regarding the Impact of P.L. 104-134 ("EFT 99"), May 22, 1997; Testimony before the Committee on Government Reform and Oversight Subcommittee on Government Management, Information and Technology regarding the Impact of P.L. 104-134 ("EFT 99") June 18, 1997; Testimony before the House Committee on Banking and Financial Services regarding the impact of Treasury's Proposed Regulation under the "EFT 99," September 25, 1997. In addition, there were numerous formal and informal meetings and discussions with Treasury officials, including October, 1996; March 19, 1997; April 8, 1997; May 19, 1997; July 11, 1997; July 24, 1997; and July 25, 1997.

adequate consumer protections. Excessive costs, lack of choice, reduced access, as well as the forced use of the other services provided by non-financial institutions, are some of the harms that will affect the unbanked if Treasury persists in refusing to regulate the voluntary accounts established by recipients to comply with EFT 99.[18]

The legislative history also indicates that Congress specifically directed Treasury to protect the interests of the unbanked:

> Since this section will require participating beneficiaries to obtain a bank account, Congress expects the Secretary of the Treasury *to work vigorously to accommodate the needs of the unbanked* recipients through such means as: (1) the planned implementation of a *national electronic benefits transfer system for Federal payments* through the designation of depositaries and financial agents *under the Secretary's existing authority.* Under this program, recipients will receive all benefit payments under a single access card; (2) implement through the private sector *consumer owned bank accounts* where recipients access their funds by debit card or other means, rather than through traditional account features, such as checking. (Emphasis added.)[19]

There are several clear messages from this expression of Congressional intent:

1) "Congress expects Treasury *to work vigorously* to accommodate the needs of the unbanked." Administrative burden is not a reasonable excuse for refusing to carry out Congress' clear mandate to regulate the accounts established by unbanked recipients.

2) Congress stated that the accounts established to comply with this law would be *bank* accounts. Obviously, Congress intended that recipients should be able to *access* the account through the bank, not that Treasury would create a second class customer relegated to a fringe banker to reach the funds, as Treasury contemplates is permissible.[20]

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[18] *See* the extensive documentation provided in Appendix D of the abuses — particularly the high costs and the lack of consumer protections -- that characterizes financial services provided to low income consumers where there is no regulation.

[19] 142 *Cong. Rec.* H4090.

[20] *See* 62 *Fed. Reg.* 48722-3: "The proposed rule is silent on the role that non-financial institutions may play (continued...)

3) The default account structure in which accounts are to be provided by Treasury may be appropriate because Treasury already had the authority to do it. However, this new law -- amendments to 31 U.S.C. § 3332 -- does not provide the statutory basis for it. As a result, the statutory language in § 3332(i), requiring the regulation of accounts, can only refer to the regulation of *all* accounts established to comply with the mandates of EFT 99, including the "voluntary" accounts.

We will address each of these messages separately:

Congress Expected Treasury To Work Vigorously To Meet the Needs of the Unbanked.[21] Judges in numerous cases have held that fear of administrative burden cannot be the rationale for an agency's failure to regulate as Congress intended.[22] Nevertheless, Treasury has chosen *not* to regulate the features of the accounts established voluntarily by recipients to comply with the law. It argues that this would be burdensome on Treasury:

> Such a broad interpretation potentially would place Treasury in the position of determining the reasonableness of prices charged by thousands of financial institutions, for a wide variety of account services, to individuals who have account relationships at institutions they have chosen voluntarily.[23]

Representatives of federal recipients have never sought to impose this extensive an administrative burden on Treasury. As Treasury notes in the preamble to the regulations:

> Another approach involves the development of a model deposit account with an invitation to financial institutions to offer this

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[20](...continued)
in the delivery of Federal payments to recipients with bank accounts and the relationship between non-financial institutions and such recipients. Treasury anticipates that non-financial institutions will continue to have the opportunity to partner with financial institutions and to market products and services to recipients."

[21] See Memorandum of Law from Crowell & Moring to the National Consumer Law Center regarding Treasury's Statutory Mandate to Regulate the Voluntary Accounts, December 15, 1997 — Appendix B.

[22] *See* Reed v. Reed, 404 U.S. 71, 76-77 (1971) (holding that administrative convenience alone did not justify a preferential system of administering statutory benefits); Frontiero v. Richardson, 411 U.S. 676, 688-91 (1973) (same); Califano v. Goldfarb, 430 U.S. 199, 205-07 (1977) (same).

[23] 62 *Fed. Reg. 48723.*

> account, at a specified price or at a price below some ceiling determined by Treasury, to individuals without accounts.[24]

Treasury then rejects this idea because of the extensive regulatory burden that Treasury believes would be entailed here. It is hard to believe that the burden complained of would actually be greater than that involved with establishing the parameters of the ETA account, going through the regulatory process, soliciting bids, choosing the providers, and maintaining the contractual relationship with the single or multiple financial institutions appointed as Treasury's financial agent or agents.

Instead, Treasury only need set the broad parameters -- based on access, reasonable costs and consumer protections -- of accounts acceptable under this scheme, and the supervision and enforcement of the baseline regulations established by Treasury could be enforced by the agencies which regulate the financial institutions. Indeed, this idea seems to be exactly what Congress contemplated when passing this law: "Congress expects the Secretary of the Treasury *to work vigorously* to accommodate the needs of the unbanked recipients . . . "[25]

Congress envisioned that the accounts established to comply would be *bank* accounts with only reasonable fees allowed and required consumer protections . Treasury contemplates that it would be permissible for federal benefit recipients to establish accounts through fringe bankers -- check cashers, finance companies and the like -- which are only accessible through those fringe bankers. No boundaries on costs or required consumer protections would be required. Given the clear language in the statute and the Congressional Record regarding the need to protect the unbanked, Congress did not permit Treasury to create a second class of bank customers with access to only fringe bankers for their federal funds, as Treasury contemplates.[26]

If Treasury refuses to limit the conduits of federal payments to regulated financial institutions, and refuses to regulate access with reasonable fees and consumer protections, unbanked federal benefit recipients will be harmed. Appendix D provides detailed documentation of the effect on low income people resulting from the failure to regulate the financial services offered by fringe bankers. Those types of results were exactly what

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[24] *Id.*

[25] 142 *Cong. Rec.* H4090.

[26] *See* 62 *Fed. Reg.* 48722-3: "The proposed rule is silent on the role that non-financial institutions may play in the delivery of Federal payments to recipients with bank accounts and the relationship between non-financial institutions and such recipients. Treasury anticipates that non-financial institutions will continue to have the opportunity to partner with financial institutions and to market products and services to recipients."

Congress sought to avoid when it required Treasury to regulate the accounts established to obtain federal benefits electronically in § 3332(i).

EFT 99 does not establish the basis for the default account. Treasury justifies its failure to regulate the voluntary accounts by relying on its extensive regulation of the default accounts which it will provide.[27] However, if there is no statutory authority in 31 U.S.C. § 3332 for the default accounts to be provided by Treasury, then the only accounts which § 3332(i) could refer to are those established voluntarily by recipients to comply with the law. In fact, there is nothing in the 1996 amendments to § 3332 which mentions default accounts, or accounts to be provided by Treasury. The default account structure contemplated by Treasury in the Proposed Regulations may be entirely legal and appropriate, but its legal genesis is based on authority Treasury had prior to passage of EFT 99.[28] As a result, the statutory language in subsection (i), requiring the regulation of accounts, can only refer to the regulation of *all* accounts established to comply with the mandates of EFT 99, including the "voluntary" accounts. The regulation of all accounts pursuant to subsection (i), would require regulation for access, reasonable costs, and consumer protections.

***Un*reasonable Fees and Lack of Consumer Protections Will Result from the Failure to Abide by the Law.** Fringe bankers, such as check cashers, finance companies, and others, do business in the low income community because of the large profits that they can make. Expensive services, extraordinarily high fees, and abusive transaction terms are standard business practices for these alternative providers. These fringe bankers make no reinvestment of their substantial profits back into the communities. They charge as much for financial services as the regulatory structure - or lack of regulation - allows. And the low income residents of the community are unable to save and gain little benefit other than the specific service provided from their presence. If this non-regulated industry is allowed to be the conduit of federal payments, the financial problems in the low income communities will be exacerbated.

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[27] "Section 3332(i) also could be read more narrowly as referring to those individuals who, as of January 2, 1999, have not voluntarily selected or opened an account a financial institution . . . . Treasury believes the latter interpretation is the better one . . . ." *Id.*

[28] Hence the reference in the Congressional Record to "the planned implementation of a national electronic benefits transfer system for federal payments . . .under Treasury's *existing authority.*" (Emphasis added). 142 *Cong. Rec.* H4090.

Check cashers[29] are NOT the appropriate alternative to banks to provide access to federal payments for the "unbanked." In only fourteen states are there even limits on the amounts that check cashers can charge to cash government checks.[30]

Low income advocates fear the use of alternative financial providers as conduits largely because of the other services that will be sold to the recipients. If recipients must go through the doors of the fringe bankers at least one time each month, it is very likely that they will fall prey to the expensive -- and unregulated -- other financial products of these

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[29] For additional information about the current practices of check cashers and pay day lenders, *see* Jean Ann Fox, *The High Cost of "Banking" at the Corner Check Casher: Check Cashing Outlet Fees and Pay Day Loans,* Consumer Federation of America August (1997).

[30] Examples of caps on check cashing fees in the few states that have limits are:

California:	3 to 3.5% for government and payroll checks, depending upon identification.
Connecticut:	1% for state welfare checks, 2% for others.
Delaware:	2% or $4, whichever is larger, for all checks.
Florida:	5% with ID or 6% without, or $5 whichever is greater for personal checks and money orders; 3% with ID, 4% without or $5 for state benefits or Social Security checks, whichever is greater.
Georgia:	The larger of $5 or 3% for welfare checks, 5% for payroll checks, and 10% for personal checks.
Illinois:	1.4% to 1.85% plus an additional 90-cent-per-check charge.
Indiana:	$5.00 or 10% of the face amount of the check, whichever is greater.
Minnesota:	2.5% of welfare checks over $500 (5% for the first check), 3% on other government and payroll checks (6% for the first check); no limit on personal checks (but rates must be filed and "reasonable").
New Jersey:	1% on New Jersey checks, 1.5% on others, or $.50, whichever is larger.
New York:	1.1% of the face amount or $.60, whichever is larger.
North Carolina:	3% or $5 whichever is greater for government checks; 10% or $5 whichever is greater for personal checks; 10% or $5 whichever is greater for all other checks.
Ohio:	3% on government checks.
Rhode Island:	The larger of $5 or 3% for welfare checks, 5% for payroll checks.
Tennessee:	3% or $2 whichever is greater for state public assistance or federal social security checks, 10% or $5 whichever is greater of personal checks or money orders.

While some of these fee ceilings may themselves seem high, in the rest of the 36 states, there are no limits whatsoever on these fringe bankers.

fringe bankers, such as check cashing,[31] payday loans,[32] high cost home equity loans, and rent-to-own transactions. While recipients may always be able to opt for these services if they care to, they should not be required to go through the doors of these alternative providers every single month in order to obtain their federal entitlement.

For once, let us learn from experience. The experiences in the low-income communities around the nation is that fringe bankers have developed sophisticated and ingenious techniques for taking money from the poor. Fringe bankers--check cashers, finance companies, and others--should not be provided a government boost to their business by serving as contractors with financial institutions for the delivery of federal payments, *unless there is an absolutely clear regulation that requires* ***access through the financial institution to the federal funds, at a reasonable cost, with consumer protections.***

"Fringe banking" is an entire industry devoted to doing business in the low-income community, which has proliferated largely as a result of the deregulation of interest rates and loan terms in many states since the 1980's. Appendix D documents the high cost of deregulation to the poor. Many of these providers constantly push the envelope in terms of the legality of their practices--they keep charging the exorbitant fees until made to stop. All too often, the abusive practices are not technically illegal, but exceed the bounds of common decency.[33] Establishing any one of the purveyors of this high cost credit as the conduit of federal payments sanctions and stimulates these types of transactions. The federal government should be in the business of discouraging high cost lending, not providing means to facilitate it.

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[31] According to a recent study of fringe banking in Milwaukee: "Customers pay far more for services provided by a check cashing business than they pay for the same services at a conventional bank. Fees for cashing payroll checks nationwide generally range between one percent and three percent of the face value of the check For personal checks the range was generally between 1.7 percent and 20 percent, averaging around 8 percent. In some instances, however, fees and interest rates have been reported as high as 2000 percent. A study by the New York Office of the Public Advocate found that a check cashing customer with an annual income of $17,000 will pay almost $250 a year at a check cashing business for services that would cost $60 at a bank. The Federal Reserve Bank of Kansas City reported that a family with a $24,000 annual income using a check cashing business will spend almost $400 in fees for services that would cost under $110 at a bank." (Citations omitted). Squires and O'Connor, *Fringe Banking in Milwaukee: The Rise of Check Cashing Businesses and the Emergence of Two-Tiered Banking System.* (1997) at 5,6.

[32] Payday loans are generally provided by check cashers who agree to cash a post-dated personal check with the understanding that it will not be deposited until the customer's next payday. "Customers can receive $50 for a check written in the amount of $60 and dated 14 days after the cash is provided. ... The effective annual interest rate for this loan is 1,092 percent." *Ibid,* at 11, 12.

[33]The legal standard applicable to judge these transactions thus becomes one of "unconscionability." Unconscionability generally refers to a transaction "which is so one sided that only one under delusion would make it and only one unfair and dishonest would accept it." *See* Cobb v. Monarch Finance Company, 913 F.Supp 1164, 1179 (N.D.Ill. 1995).

We know that check cashers and other fringe bankers are already seeking to expand their business opportunities as a result of EFT 99. (See Appendix C.) If they are successful, federal recipients will be required every month, month after month to go back to the check casher to receive their federal benefits. The costs will be excessive. In one example from Minneapolis -- a state which limits the amounts that check cashers can charge to 2% for government checks -- the *monthly* cost to receive cash for a federal payment of $500 will be $13.95![34] For this cost no new services are provided.

If Treasury's proposed regulation is implemented, when the recipient signs up with a fringe banker to receive the federal payment through it, the recipient gains no advantages, only additional costs, and ends up with a lack of choice each month as to where to cash the check. This benefit recipient also becomes a likely prospect for the other loan products of the check casher, such as payday loans. The result is that the federal payment simply ensures that the recipient becomes a captive customer of that fringe banker, without even the present opportunities to go elsewhere if treated unfairly. Treasury's failure to impose any regulations on access to the accounts into which the federal payments will be delivered is tantamount to federal encouragement and support of fringe bankers. Moreover, the lack of regulation will cause substantial harm to the unbanked. The attached Appendix D provides extensive examples of the abusive charges and practices of fringe bankers when there is a lack of effective regulation.

There are several reasons that some low income people choose to use check cashers rather than banks. Very often, low income people cannot afford to use banks: they cannot afford the fees or minimum balances required for accounts. Presumably the proper design of Direct Deposit Too accounts will remedy the financial aspect of this issue. However, many low income people do not use banks even when affordable accounts are offered because of privacy concerns, fears of having their funds attached by creditors, or just because banks are not as comfortable to them as the local check casher or retailer. Reassurances of privacy and of the anti-attachment prohibitions for Social Security funds should address the first two aspects of this concern. (See Section IV of these comments.) The last aspect -- the level of comfort -- can be addressed by simply allowing check cashers to continue providing their services in the community as they do currently.

We do not propose that fringe bankers be prohibited from providing any access to federal money, just not that they be the sole access for any federal recipient. Nothing prohibits check cashers from establishing ATM or POS devices on their premises and selling recipients all of the products and services that are now currently offered. The key distinctions between this and allowing alternative financial providers to be contractors with financial institutions for the delivery of federal electronic payments are:

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[34] There is a $12 annual fee, a $2.95 monthly fee, and 2% of $500 is $10.00.

1) If recipients can receive their federal payments through "financial institutions" as currently defined by Treasury, they will be pulled into the mainstream banking system, and thus provided savings' opportunities as well as alternative (and less expensive) sources for credit.

2) Recipients who must have a bank account, but who nevertheless choose to access their money through a check casher or a money transmitter, will still have the choice every month of where to obtain their funds-- they would not be forced to go to the check cashers to receive their federal payments.

3) The banks receiving the federal payments will have a greater source of funds as a basis for community reinvestment into the low income community, whereas the check casher has no such obligation.

As advocates of low income people, and of consumers generally, we basically agree that electronic transfers are a more efficient and safer method of receiving payments than the paper check based system. However, the additional advantages of the electronic system quickly evaporate if recipients have higher costs, unanticipated risks, and greater potential losses, *as will clearly occur under the Proposed Regulations, because Treasury has failed to provide even a minimal level of regulations for the accounts established by recipients.*

II. The Hardship Waivers Established by Treasury Are Too Limited.

The scheme proposed by Treasury of allowing recipients to self-certify their eligibility for a hardship exemption so as to continue to receive payment by check rather than EFT is good, in so far as it goes.[35] Treasury anticipates that "a waiver from payment by EFT will be automatic and based solely on the individual's certification."[36] Serious hardships will be caused, however, to many federal recipients because the criteria for hardship waivers are far too narrow. There will be one of two adverse results: either 1) federal recipients will be forced to surrender a level of independence, and be subjected to unacceptable charges and abusive practices they would not have encountered in the check based environment; or 2) they will have to **lie** on their self-certification waiver to avoid expensive or inaccessible electronic deposits -- a result which should not be encouraged by a federal regulation.

A. No Waivers Are Provided for Those with Mental Disabilities, Literacy Problems or English Fluency Issues.

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[35] Proposed 31 C.F.R. 208.4.

[36] 62 *Fed. Reg.* 179 at 48718, September 16, 1997.

Treasury ignores the legislative history on the hardship exemption in the Act by excluding from the enumeration of qualifying criteria:

-- mental handicap,
-- educational hindrances,
-- language problems,
-- financial hardship if the recipient has a bank account, and
-- *any* criteria whatsoever, if the recipient has a bank account and becomes eligible for the federal payment after July 26, 1996.

Treasury seems to have ignored the explicit intent of Congress, as evidenced in the Legislative History, to use hardship waivers to ease the transition to an electronic payment system:

> *The Secretary of the Treasury is given broad discretion to waive the requirements of this section to avoid imposing a hardship on a beneficiary.* Congress expects the Department of the Treasury to promulgate regulations addressing such hardship waivers and to consider various factors in defining hardship. Congress recognizes that adherence to these provisions may be difficult for a variety of beneficiaries. We are concerned that individuals who have geographical, physical, *mental, educational, or language barriers* or as a result of natural or environmental disasters will not be able to receive benefits. Recipients in this category includes small businesses as well as individuals. *Waivers should be provided in order to minimize disruptions to any beneficiary.*[37]

Under the proposed regulations, none of these conditions would be just cause for the granting of a waiver from the EFT requirement. Only physical handicap, geographic barrier, or financial hardship for the unbanked, would qualify as a hardship criteria. The rationale offered by Treasury for this decision in the preamble to the proposed regulations evidences a lack of true understanding or compassion for the populations that would be affected.

Mental Disability. Treasury simply states that waivers would not be required for persons with a mental disability. The rationale offered is that those who have a mental disability that makes them incapable of managing their own funds would have a representative payee appointed for them by the applicable program agency and such payee

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[37] 142 *Cong. Rec.* H 4091.

would presumably be able to handle an EFT payment arrangement unless he/she individually met one of the other exemption criteria.[38] There are several very important considerations that Treasury leaves out of its overly simplistic justification. First, there are a very large number of recipients with mental impairments who are quite capable of managing their own funds in a check based system and who, absent a transition to an electronic delivery system, could function independently without the need of turning their finances over to a representative payee. Some of these recipients may simply be unable to remember a PIN; others may have a limited ability to think conceptually and, while they can count out money to make purchases or even write checks to pay bills, cannot deal with abstract benefits they cannot see and feel. It is simply unconscionable to say that, because the government wants to save some money, such individuals should now have to put someone else in charge of their funds and give up that level of control over their own lives.

The second consideration that Treasury ignores is that there is already a great difficulty in finding persons or entities willing to serve as representative payees for those government benefit recipients who are truly incapable of managing their own funds. SSA officials over the years have acknowledged this problem and there has been a concerted effort to identify entities willing to serve in this capacity. In some parts of the country there is a thriving business of individuals and agencies that sell their services to be a representative payee to persons who can not otherwise find someone. By forcing even more people into a situation where they will have to have a representative payee in order to receive their government benefits, Treasury will in effect be supporting the growth of this industry that takes money out of the pockets of some of our neediest citizens without any tangible benefit to the program recipients.

A final consideration ignored by Treasury's justification for its position is the possible risk of loss of benefits to recipients if they are forced into a representative payee situation, especially in those cases where the representative is someone with whom the recipient does not otherwise have a relationship, such as the pay for service arrangements discussed above. While Congress has made clear that recipients of direct federal payments in an EFT

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[38] 62 *Fed. Reg.* 179 at 48718, September 16, 1997.

environment are fully covered under the Reg E protections,[39] the Reg E[40] limitations on consumer liability for losses that are associated with the use of a valid card and PIN do not apply if those benefits are accessed by a representative payee who misappropriates the funds for his/her own use. Thus, there would be no protection for recipients who felt compelled to pay some stranger to serve as their representative payee so that they could get their government benefits only to find that such person wiped out their accounts and moved on.

Limited Literacy Skills and English Fluency. Treasury's proposed rule also does not envision permitting a hardship waiver on the basis of educational level, limited literacy skills, or lack of fluency in English. Here Treasury argues first that these factors do not pose any barriers unique to an EFT delivery mechanism as opposed to a check system.[41] Such an assertion is again simply untrue. Many persons who fall within one of these categories can in fact operate in a paper based environment, sometimes alone and sometimes with the help of friends and family, even if they cannot read or write or are not fluent in English. It does not take an ability to read or write to sign a check with an "X" or an ability to read English to sign your name on the back of a check. It does on the other hand require an ability to read English or one of the other limited languages that may be available on a POS or ATM screen to negotiate an electronic debit of funds. It is those who are not literate and/or fluent in English that are most likely to end up with an electronic debit only account. It is these populations who will not otherwise have a relationship with a bank and therefore will not even be able to avail themselves of teller assistance when they cannot negotiate the ATM.

Treasury's next argument is that whatever problems EFT may pose for these segments of the population are merely a "short-lived" "transitional hurdle" that it asserts will be overcome by targeted educational programs.[42] Since, to the best of our knowledge, Treasury has no plans to offer any in-person training on how to use debit card technology or on how to shop around for low cost bank accounts that will permit direct deposit , it is unclear how they plan to "educate" this population to get them through the transition. The printed materials they appear to be relying on most heavily for their educational campaign will be

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[39] This is required by the language in 31 U.S.C. § 3332(i):

> Regulations under this subsection shall ensure that individuals required under subsection (g) to have an account at a financial institution . . .
> (A) will have access to such an account at a reasonable cost; and
> (B) are given the same consumer protections with respect to the account as other account holders at the same financial institution.
> (emphasis added.)

[40] Reg E is found at 12 C.F.R. 205, implementing the Electronic Fund Transfers Act, 15 U.S.C. 1693 *et seq.*

[41] 62 *Fed. Reg.* 179 at 48719, September 16, 1997.

[42] *Id.*